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MEDIA ACCESS PROJECT

September 9, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M St., NW
Washington DC 20554

Re: *Ex parte* presentation in MM Docket 93-25

Dear Ms. Salas:

Copies of the attached memorandum have been provided to Rosalee Chiara and James Taylor of the International Bureau and Joel Kaufman and Marilyn Sonn of the Office of General Counsel. Pursuant to Section 1.1206(b)(2) of the Commission's rules, an original and three copies are being submitted to your office today.

Sincerely,

Cheryl A. Leanza
Staff Attorney

cc: Rosalee Chiara
James Taylor
Joel Kaufman
Marilyn Sonn

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MEMORANDUM

September 10, 1998

MEDIA ACCESS PROJECT

From: Cheryl A. Leanza
Gigi B. Sohn

Re: Section 25(b) of the 1992 Cable Act; MM Docket 93-25.

Section 25(b) of the 1992 Cable Act states that a DBS provider "shall not exercise any editorial control over any video programming" on the 4 to 7 percent channel capacity set-aside required by that section. 47 USC §335(b). Media Access Project has recently met with Commission staff on behalf of Denver Area Educational Telecommunications Consortium *et al.* to discuss whether this prohibition on editorial control would permit a DBS provider unfettered discretion to instead select eligible ***programmers*** for that capacity.

As this memo shows, under Commission precedent interpreting statutory language that is identical to that contained in Section 25(b), such behavior is prohibited. In addition, the legislative history of the 1984 Cable Act demonstrates that Congress, in adopting this language in the cable leased access context, saw no difference between the selection of programmers and programming. Because the Commission may not give DBS providers control over either programming or programmers, DAETC *et al.* provide a number of options the Commission might propose to implement Congress' mandate.

The Commission's Leased Access Precedent

The leased access provisions of the Communications Act contain a prohibition on the exercise of editorial control by a cable operator that is identical to the prohibition placed on DBS providers in Section 25(b).[1] When it recently interpreted this language, the Commission prohibited operators from selecting leased access programmers. It concluded that, "so long as there is available capacity" a cable operator must accommodate all programmers seeking space on leased access channels. *1992 Cable Act Implementation, Second Report and Order*, 12 FCC Rcd 5267 at 5317, ¶99 (1997). If sufficient capacity is not available, the Commission concluded that the cable operator was ***not*** free to make unfettered decisions with respect to which programmers could use available capacity. Instead, the Commission concluded that the cable operator must make an "objective, content-neutral selection among the competing ***programmers***." *Id.* at ¶100 (emphasis added). The Commission concluded that the operator could choose among programmers by holding a lottery, or, could base its decision on content-neutral criteria. The Commission provided examples of content-neutral criteria, such as the amount of time a programmer would be willing to lease. *Id.*

[1]Section 612(c)(2) provides that "a cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming," except in the case of programming containing obscenity or indecency. *See* 47 USC § 612(c)(2).

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The Commission cannot reasonably conclude that cable operators prohibited from exercising editorial control are prohibited from selecting among programmers, but DBS providers subject to an identical prohibition are not. *See, e.g., Motor Vehicle Mfrs. Assoc. v. State Farm*, 103 S.Ct. 2856, 2866 (1983). Not only would such a decision be contrary to law, it would adopt unsound policy. If the Commission were to allow DBS providers to determine which programmers may and may not place programming on the set-aside capacity, it would undermine the purpose of Section 25(b) - to create a "safe" space for programming that is not subject to market-based decisionmaking of DBS providers. The structure of Section 25 supports this. Section 25(a) allows the Commission to adopt general public interest obligations, but places no restrictions on a DBS providers' editorial control. By contrast, Section 25(b) creates a set-aside free from DBS provider's editorial control. Permitting DBS to select programmers or programming renders Congress' plain language meaningless.

A construction of the statute that separates programming from the programmers who produce it also ignores the realities of program production. Programming does not spontaneously self-generate. Programming is produced by programmers, and these programmers are the individuals who might attempt to obtain space on a DBS system and are the individuals with whom a DBS provider will need to negotiate to place programming on the set-aside. To separate the two presupposes a world that does not exist.

If, however, the Commission nonetheless concludes that DBS providers should be able to select among eligible programmers when the available capacity is insufficient to accommodate all programmers, DAETC *et al.* would support a rule that would allow DBS providers to select among programmers according to objective, content-neutral criteria similar to the criteria approved in the Commission's leased access order. For example, a DBS provider could 1) conduct a lottery, 2) choose programming based on whether the length of the proposed program would conform with the current schedule, 3) prefer a programmer that has not yet received space on the set-aside, or 4) choose programming based on commonly accepted technical quality.

Legislative History of the 1984 Cable Act

The legislative history of the leased access provisions of the 1984 Cable Act shows that Congress did not intend the prohibition on the exercise of editorial control to permit content-based choices of either programming or programmers. *See generally*, H.R. Rep. 98-934 at 47-55 (1984).[2] The detailed language of the House Report makes apparent that, when it adopted

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[2]In expressing its disapproval of content-based decisionmaking by cable operators, the House Committee stated:

> The overall purpose of this section is to prohibit any editorial control by the cable operator over the selection of programming provided over channels designated for commercial leased access. ***This prohibition . . . restricts the cable operator from considering the content of a proposed service, thus assuring that even indirect editorial influences do not permeate what the Committee intends to be content-blind, arm's length negotiations over access to the set aside channels.***

the leased access provisions, including the prohibition on the exercise of editorial control by cable providers (which is identical to the language contained in Section 25(b)), the House Committee on Energy and Commerce was concerned about the possible consequences of giving cable operators control over both programming and programmers. The Committee used the two terms interchangeably:

> Cable operators clearly have an incentive to provide a diversity of program services -- that is, the more diverse types of services provided to the public, the greater the number of audience interests being catered to and, hence, the greater the audience attraction to the system. However, cable operators do not necessarily have the incentive to provide a diversity of programming ***sources***, especially when ***a particular program supplier's offering provides programming which represents a social or political viewpoint that a cable operator does not wish to disseminate, or the offering competes with a program service already being provided by that cable system.***

H.R. Rep. 98-934 at 48 (1984) (emphases added).

Rather than drawing distinctions between programmers and programming, the House Committee drew a distinction between the set-aside and the rest of the cable operator's channel capacity, over which it does have editorial control. Thus, the Report states that the "overriding goal in adopting this section is divorcing cable operator editorial control over a limited number of ***channels.***" *Id.* at 50. This demonstrates that the Committee intended that the channel capacity set-aside be a separate space free from any and all decisionmaking from the cable operator.[3]

DAETC Revised Proposal: Increased Options for DBS Operators

DAETC *et al.* do not argue that the Commission is limited to mandating the same editorial control model for DBS as it has for leased access to comply with Section 25(b)'s directive. Instead, DAETC *et al.* propose that the Commission permit a DBS provider to choose among one of several pre-approved options to fulfill its obligation under the statute. A DBS provider should be allowed insulate itself from exercising editorial control by choosing any of the following options (or any others that the Commission might propose that would remove editorial control from the DBS provider):

Id. at 51-52 (1984) (emphasis added). In addition, the Committee stated that it "is extremely concerned with the potential risk posed by indirect editorial control being exercised by a cable operator over use of leased access channels. Thus, only in establishing a reasonable price, and not in establishing other terms and conditions, may the content of the proposed service be considered." *Id.* at 52.

[3]The House Report language is the relevant legislative history for the meaning of the term "editorial control," because the Senate Bill did not contain a leased access provision. The final bill contained the House language virtually unchanged, including the exact prohibition on editorial control.

- A DBS provider may select the leased access model and provide capacity to all programmers who seek it when there is more capacity than eligible programmers, and use content-neutral criteria to choose between programmers when all requests cannot be accommodated.

- A DBS provider could choose to team with some or all of the other DBS providers to create a consortium that could exercise full editorial control of the channel, selecting and scheduling programs based on content, technical quality, or other criteria. The DBS industry would be represented on the consortium, but majority control would be vested in representatives (chosen by the DBS providers) that would have no interest in, or relation to, any DBS providers. These representatives could include, *inter alia*, public broadcasters, educators, community leaders, and children's advocates.[4] To preserve the independence of the consortium, the members of the board could individually certify that the consortium was complying with the statutory requirement that DBS providers exercise no editorial control over the programming selected for the set-aside. To help ensure this independence, the Commission should adopt limits on compensation for the consortium board members. For example, unaffiliated representatives could be compensated for their expenses, but should not receive salaries for their participation.

- A DBS provider could form an independent, arms-length non-profit entity to program the set-aside channel capacity on that operator's service.[5] To ensure independence from the individual DBS provider, the same requirements with respect to certification and compensation should apply to the non-profit's board members as apply to the consortium. In addition, since the risk of DBS provider influence would likely be greater in a single non-profit, proportional representation and voting power of the DBS provider on the non-profit's board should be smaller than that of the consortium, for example, no more than 10 percent.

DAETC *et al.* believes this proposal complies with the statutory prohibition on the exercise of editorial control, but also grants DBS providers the flexibility they will need to promote DBS service and ensure its success. Under this proposal, the Commission would set forth in advance the requirements for each of the options available to DBS providers, thus providing certainty to the members of the industry.

If Commission staff would like additional information on the record, DAETC *et al.* would be happy to provide the Commission with further details regarding the requirements necessary for a consortium or a non-profit to operate free from the control of the DBS provider.

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[4]This option is similar to the proposal initially submitted in DAETC *et al.*'s initial comments in this docket. *See* DAETC *et al.* comments at 18-20 (filed Apr. 28, 1998).

[5]Echostar has proposed creating such a nonprofit corporation.